

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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VALERIE A. HOLLENBACK,

Plaintiff,

v.

WILLIAM P. BARR,

Defendant.

Case No. 3:19-cv-00151-MMD-WGC

ORDER

I. SUMMARY

Pro Se Plaintiff Valerie A. Hollenback sued for employment discrimination and retaliation based on her race, sex, and national origin under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-17) (“Title VII”) following her 2015 termination from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). (ECF No. 1.) The Court previously granted Defendants’ motion to dismiss Plaintiff’s initial complaint for naming the wrong defendants, and for insufficient service of process. (ECF Nos. 8 (motion), 15 (order).) Plaintiff then filed a first amended complaint (ECF No. 16 (“FAC”)), and Defendant William P. Barr, in his official capacity as Attorney General of the United States, moved to dismiss, this time for failure to satisfy Fed. R. Civ. P. 8(a), and for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (ECF No. 21 (the “Motion”)).¹ The Motion is now before the Court. As further explained below, the Court will grant the Motion and dismiss Plaintiff’s FAC as inadequately pleaded, but will give her another opportunity to amend.

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¹Plaintiff filed a response (ECF No. 27), and Defendant filed a reply (ECF No. 28)

II. BACKGROUND

Plaintiff generally alleges as follows in her FAC. (ECF No. 16.) Plaintiff was hired by ATF in April 2013. (*Id.* at 3.) She started in the ATF office in Stockton, California, but was temporarily reassigned to Sacramento, California. (*Id.*) Jolene Blair was assigned to train her in Sacramento. (*Id.*) Some hours after Plaintiff met with Blair to discuss how she needed to be more professional, Blair walked by Plaintiff's desk and asked her what she was doing. (*Id.*) Plaintiff said she was tracking a package containing a bathing suit. (*Id.*) Blair replied, "are you sure it was a bathing suit, and not a vibrator?" (*Id.*)

Plaintiff told other ATF employees "that it was hypocritical for SA Blair to question [Plaintiff's] professionalism and then make an unprofessional comment herself." (*Id.* at 3-4.) Plaintiff then basically alleges that she was transferred from ATF office to ATF office, and ultimately terminated, because she reported the fact that Blair made this comment to others. (*Id.* at 4-8.) Further, at a subsequent meeting with a supervisor, that supervisor told Plaintiff that "she will have a hard time with the ATF since she is female and a minority." (*Id.* at 5.) Plaintiff also alleges that she was disciplined and then terminated for not timely filling out required forms after being involved in an on-duty car accident where she was not at fault, but another male agent was not when he was involved in a different, but similar, on-duty car accident. (*Id.* at 6-7.) Thus, Plaintiff alleges that she was discriminated against because she is an Asian American woman of Filipino ancestry. (*Id.* at 1-2, 8-9.) She also alleges retaliation. (*Id.* at 8-11.)

III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*

1 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555.) “Factual allegations
2 must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to
3 survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a
4 claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal citation omitted).

5 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
6 apply when considering motions to dismiss. First, a district court must accept as true all
7 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
8 to the assumption of truth. See *id.* at 678-79. Mere recitals of the elements of a cause of
9 action, supported only by conclusory statements, do not suffice. See *id.* at 678. Second,
10 a district court must consider whether the factual allegations in the complaint allege a
11 plausible claim for relief. See *id.* at 679. A claim is facially plausible when the plaintiff’s
12 complaint alleges facts that allow a court to draw a reasonable inference that the
13 defendant is liable for the alleged misconduct. See *id.* at 678. Where the complaint does
14 not permit the court to infer more than the mere possibility of misconduct, the complaint
15 has “alleged—but it has not show[n]—that the pleader is entitled to relief.” *Id.* at 679
16 (internal quotation marks omitted). That is insufficient. When the claims in a complaint
17 have not crossed the line from conceivable to plausible, the complaint must be dismissed.
18 See *Twombly*, 550 U.S. at 570.

19 **IV. DISCUSSION**

20 Defendant’s arguments in his Motion are two flavors of the same argument: that
21 Plaintiff’s FAC is inadequately pleaded. (ECF No. 21.) Plaintiff does not strenuously
22 disagree, as evidenced by the fact that she focuses a nonnegligible portion of her
23 response on requesting leave to amend. (ECF No. 27 at 3-4.) The Court agrees with
24 Defendant. The Court will first address the inadequacy of Plaintiff’s pleading in her FAC,
25 and then explain it will give Plaintiff another opportunity to amend her complaint.

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A. Inadequacy of Pleading

The Court will dismiss the FAC because the factual allegations in it do not allege plausible claims for relief. See *Iqbal*, 556 U.S. at 678-79. As Defendant argues, while Plaintiff need not satisfy a heightened pleading standard for her claims to survive the Motion, she must allege facts showing the elements of each of her causes of action. (ECF No. 21 at 5.-6) Even liberally construing the FAC, Plaintiff has not done so.

To start, neither Plaintiff's precise claims, nor the key elements of those claims, are sufficiently well-defined for the Court to make out what they are. In two instances in the FAC, Plaintiff alleges that she was terminated by ATF after she was discriminated against because of her gender, sex, race, and national origin, and retaliated against, after "engaging in protected EEO activity." (ECF No. 16 at 1-2, 8.) But Plaintiff then proceeds to characterize her claims as one for discrimination and harassment based on her gender only (*id.* at 8-9), and one for retaliation after she expressed opposition to ATF policies or practices, though the FAC does not otherwise describe her opposition to ATF policies or practices (*id.* at 9-11).

More specifically, as Defendant also points out (ECF No. 21 at 9), Plaintiff's retaliation claim identifies her protected activity as opposing Defendant's unlawful and discriminatory practices by submitting multiple verbal and written complaints, but the Court was unable to locate any factual allegations consistent with this statement in the rest of Plaintiff's FAC (ECF No. 16 at 10; see also generally *id.*). Instead, the factual allegations that appear most related in the rest of the FAC seem to identify Plaintiff telling other supervisors about Blair's inappropriate, sexualized comment as her protected activity. (See *id.*) Her retaliation allegations are therefore unclear, contravening Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). The Court is also unable to discern which verbal and written complaints Plaintiff is referring to in the rest of the FAC. (ECF No. 16 at 10.) Having a specific paragraph for each complaint, including the pertinent date and a description of each

1 complaint, may provide support for Plaintiff's retaliation claim that the FAC is currently
2 lacking.

3 More generally, while Plaintiff states at two points in her FAC she is suing for race
4 and national origin discrimination, the factual allegations in her FAC do not provide support
5 for those allegations. See *O'Donnell v. U.S. Bancorp Equip. Fin., Inc.*, Case No. C10-0941
6 TEH, 2010 WL 2198203, at *4 (N.D. Cal. May 28, 2010) (dismissing Title VII complaint
7 with leave to amend, mentioning that "formulaic and conclusory allegations are insufficient
8 to state a claim under the governing pleading standards."). Plaintiff's factual allegations
9 instead appear to focus on her gender as motivating others' animus—for example, when
10 she was disciplined for improperly reporting an on duty car accident, but a male colleague
11 was not. (ECF No. 16 at 6-7.) In sum, it is unclear to the Court from the FAC whether
12 Plaintiff's claims encompass claims for race and national origin discrimination, and Plaintiff
13 does not plausibly allege her retaliation claim.

14 Further, and as Defendant also argues, Plaintiff's discrimination claim requires a
15 causation element currently missing from the FAC—that discrimination based on one of
16 Plaintiff's characteristics caused others to take adverse action against her. (ECF No. 21
17 at 6.) Plaintiff can demonstrate this by pointing to other, similarly-situated colleagues who
18 do not share her protected characteristics, and explaining how they were treated
19 differently. (*Id.*) See also *Fernandez v. Bd. of Regents of Nevada Sys. of Higher Educ.*,
20 645 F. App'x 572, 573 (9th Cir. 2016) ("individuals will typically be similarly situated 'when
21 they have similar jobs and display similar conduct'") (quoting *Vasquez v. Cty. of Los*
22 *Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)). Such allegations would allow the Court to
23 draw an inference that discrimination caused Plaintiff's treatment, not Plaintiff's own job
24 performance. Again, the allegations that get the closest to plausible in this regard are
25 Plaintiff's allegations that a male colleague was treated differently than her after getting
26 into an on-duty car accident while parked. (ECF No. 16 at 6-7.) But even those allegations
27 are missing crucial allegations that could demonstrate that other person is similarly
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1 situated to Plaintiff—such as allegations that he had the same supervisor, that he was also
2 unable to timely complete an accident report because the driver at fault refused to provide
3 information, and that the circumstances of the accident were otherwise similar to hers.
4 See *Fernandez*, 645 F. App'x at 573. And to the extent Plaintiff would like to allege claims
5 for race and national origin discrimination, she must provide supporting factual allegations
6 showing how she was treated one way, and colleagues of different races or from different
7 countries were treated differently under similar circumstances. She has not done so in the
8 FAC.

9 Plaintiff's factual allegations of retaliation—frequent transfers and ultimately
10 termination because she told others about Blair's inappropriate comment—also fail to
11 state a claim. First, Plaintiff does not allege that telling others about Blair's inappropriate
12 comment was protected activity. (ECF No. 16 at 3-8.) Moreover, the Court is unable to
13 discern from the FAC that supervisors took subsequent adverse actions against Plaintiff
14 because she told others about Blair's comment. Thus, Plaintiff's retaliation claim lacks
15 allegations that would establish the required causal element of that claim—even if the
16 Court considers the allegations about Blair instead of the allegations about making
17 unspecified written and verbal complaints indicating opposition to ATF's policies and
18 practices Plaintiff refers to towards the end of her FAC. (*Id.*; see also *id.* at 9-11.)

19 In sum, the Court will grant the Motion because the FAC lacks the requisite factual
20 allegations described above, and is unclear as to both the claims Plaintiff is asserting in
21 this case, and which factual allegations relate to which claims. As the Court finds
22 Defendant accurately lists the elements of the causes of action Plaintiff is most likely trying
23 to assert, the Court refers Plaintiff to the Motion when she prepares her second amended
24 complaint, so Plaintiff can ensure each of her claims is supported by sufficient factual
25 allegations. For example, “[t]o state a claim for employment discrimination on the basis of
26 gender, Plaintiff must allege facts showing the following elements: ‘(1) that [s]he belongs
27 to a protected class; (2) [s]he was qualified for the position; (3) [s]he was subject to an
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1 adverse employment action; and (4) similarly situated individuals outside [her] class were
2 treated more favorably.” (ECF No. 21 at 5 (citation omitted).) As also explained above,
3 Plaintiffs allegations in the FAC lack factual support going to elements three and four. In
4 any event, assuming Plaintiff prepares a second amended complaint, referring to this and
5 other statements of the elements of potentially pertinent causes of action in the Motion
6 may prove useful to Plaintiff in preparing that amended complaint.

7 The Court will also address two points Plaintiff raises in her opposition to the
8 Motion. First, Plaintiff states that “Defendant asserts no *factual* inadequacy in the
9 Complaint[.]” (ECF No. 27 at 2 (emphasis in original).) Quite to the contrary, this is exactly
10 what Defendant argues in his Motion—and the Court agrees with Defendant. As explained
11 above, the Court must dismiss Plaintiff’s FAC because Plaintiff’s claims therein lack
12 crucial, supporting factual allegations. Second, Plaintiff appears to summarize the heart of
13 her claims in enumerated paragraph six of her opposition to the Motion, but those claims
14 are not clearly reflected in her FAC. (*Id.* at 3.) Is the ‘EEO action’ Plaintiff refers to there
15 the inappropriate comment by Blair, Plaintiff’s reporting of it, or something else altogether?
16 (*Id.*) The Court cannot say. The Court is also unable to locate factual allegations in the
17 FAC—or even a conclusory allegation—supporting Plaintiff’s statement in her opposition
18 that she was subject to different training criteria because she is an Asian American female.
19 (*Compare id. with* ECF No. 16.) And as also explained above, as to Plaintiff’s allegation
20 that a male colleague in the Reno Field Office received disparate treatment from her, the
21 FAC lacks allegations showing that he was similarly situated to Plaintiff. (ECF No. 27 at
22 3.) Thus, Plaintiff’s summary of pertinent allegations in her opposition to the Motion either
23 do not appear in the FAC, or lack the requisite factual supporting allegations where they
24 do.

25 **B. Leave to Amend**

26 “The Ninth Circuit has made clear that when a *pro se* plaintiff fails to state a claim,
27 leave to amend should be granted unless the pleading could not possibly be cured by the
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allegation of other facts.” *Knight v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:13-CV-01346-BR, 2013 WL 6493102, at *6 (D. Or. Dec. 10, 2013) (citation, internal quotation marks, and punctuation omitted). Here, Plaintiff could add factual allegations and dates consistent with her FAC indicating a causal linkage between her protected characteristics, and the adverse actions taken against her, along with offering clearer definition of her protected activities, and how she was retaliated against for engaging in them. The Court will therefore grant her leave to amend.² If Plaintiff chooses to file a second amended complaint, she must file it within 30 days, and then properly serve that complaint, paying careful attention to Fed. R. Civ. P. 4. Failure to file an amended complaint within 30 days may result in the Court dismissing this case with prejudice.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motion.

It is therefore ordered that Defendant’s motion to dismiss (ECF No. 21) is granted.

It is further ordered that Plaintiff’s FAC (ECF No. 16) is dismissed, in its entirety, as inadequately pleaded. Dismissal is without prejudice and with leave to amend within 30 days. Failure to file an amended complaint within 30 days of the date of entry of this order may result in the Court dismissing this case with prejudice.

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²The Court declines Defendant’s suggestion to either not grant leave to amend at all, or explicitly limit Plaintiff to one more amendment. (ECF No. 28 at 2.) If dismissal is appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless it is clear that those deficiencies cannot be cured. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995). The Court is unconvinced at this point the deficiencies of the FAC cannot be cured, and reserves ruling on the futility of future amendment until such futility were to become clear. Thus, the Court declines to preemptively restrict Plaintiff to only one more attempt at amendment.

1 The Clerk of Court is directed to mail Plaintiff a copy of this order.

2 DATED THIS 3rd Day of December 2020.

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5 MIRANDA M. DU
6 CHIEF UNITED STATES DISTRICT JUDGE
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